

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**WILLIAM E. LUCAS,  
Claimant Below, Appellant**

**vs.) No. 35730 (BOR Appeal No. 2043064)  
(Claim No. 2006035679)**

**WEST VIRGINIA OFFICE INSURANCE  
COMMISSION and KROGER LIMITED  
PARTNERSHIP 1, Appellees**

**FILED**  
**June 21, 2011**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review order dated January 5, 2010. That order affirmed the decision of the Administrative Law Judge dated April 7, 2009, who had affirmed the Claims Administrator's order dated February 6, 2008. The lower entities denied the claimant's January 29, 2008, application for reopening on a partial disability basis on the grounds that West Virginia Code § 23-4-16 (2005)(Repl. Vol. 2010) barred such request. This appeal was timely filed by the claimant. The claimant requests that the Court grant his petition for appeal; reverse the Board's January 5, 2010, order; and reopen his claim for a permanent partial disability award.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, this Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The claimant, employed as a warehouse worker, injured his neck when he fell out of the back of a tractor trailer on August 23, 1996. The claimant filed a workers' compensation claim, which was approved. On March 24, 1998, the claimant was injured in a non-occupational automobile accident. Also, the claimant suffered a second, non-occupational lower back injury when he was "pitching" hay on or around September 3, 1998.

Care and treatment of the claimant's neck has been authorized as compensable; however, care and treatment of the claimant's lower back has not. The Workers' Compensation Division, by order dated February 24, 2000, denied authorization for an MRI of the claimant's lumbar spine, EMG of the claimant's lower extremities, and treatment

related to the claimant's lower-back problems. The Workers' Compensation Office of Judges, by decision of Administrative Law Judge dated September 29, 2000, affirmed the Division's order dated February 24, 2000. The appellant did not appeal from the decision of the Administrative Law Judge dated September 29, 2000; thus this order is final, and will not be considered further by this Court.

The claimant sought to reopen his claim for additional permanent partial disability based upon the diagnosis update of Dr. Saldanha dated October 10, 2006. However, this reopening was clearly after the five-year statutory period found in West Virginia Code § 23-4-16(a)(2). The initial award for this case was April 14, 1998, for the orthopedic component and August 25, 1999, for the psychiatric disability. The five-year statutory period had already expired from the date of either award in 1998 or 1999. While the lower entities acknowledged the diagnosis updates contained within Dr. Saldanha's report, the claimant's assertion that these conditions were added as compensable components of the claim are a mis-characterization of the record. The lower entities acknowledged the updates, but found them relatable to the two non work-related intervening injuries: motorcycle injury and an injury "pitching" hay. Therefore, we agree that the petition for reopening was untimely and this claim is refused by this Court.

For the foregoing reasons, we find that the West Virginia Workers' Compensation Board of Review did not err in affirming the Administrative Law Judge's decision. Therefore, we affirm the Board and deny the requested reopening of Mr. Lucas's permanent partial disability claim as being untimely.

Affirmed.

**ISSUED:** June 21, 2011

**CONCURRED IN BY:**

Chief Justice Workman  
Justice Davis  
Justice Benjamin  
Justice Ketchum  
Justice McHugh